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IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA; BART L. GRAHAM, AS COMMISSIONER OF REVENUE OF THE STATE OF GEORGIA; RUSSELL W. HINTON, AS STATE AUDITOR OF THE STATE OF GEORGIA; AND GENA L. ABRAHAM, AS DIRECTOR OF THE GEORGIA STATE PROPERTIES COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a non-profit trade association that represents the Nation's major railroads. Its members are interstate rail carriers subject to the jurisdiction of the U.S. Surface Transportation Board.[1] They account for the great majority of rail freight business in the United States, employing 93% of the workers and generating approximately 95% of the freight revenues. AAR represents member railroads before courts, agencies, and the Congress in matters of common concern.

Rail carriers are among the oldest and most important instrumentalities of interstate commerce. The transportation of commodities from state to state over rail lines is critical to the Nation's economy and the national defense. Railroads carry hundreds of billions of dollars of goods each year, including shipments for the U.S. military services. Interstate rail traffic has increased substantially in recent years, and is expected to grow further as states, localities and shippers seek to shift freight from congested highways onto rail lines.[2] Class I railroads—the largest interstate rail carriers—paid over $558 million in property taxes in 2006.

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[1] Petitioner and Respondents have consented to the filing of this brief. Their mutual consent letter was filed with the Clerk on July 25, 2007. No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief (although Petitioner, which is a member of AAR, pays general membership dues).

[2] Shifting freight from highways to rail lines also provides economic and environmental benefits because railroads are substantially more fuel-efficient than trucks and produce less pollution. *See, e.g.*, STB Ex Parte No. 671, Statement of The Honorable Jeffrey N. Shane, Under Secretary for Policy, U.S. Department of Transportation 1, 7 (Apr. 11, 2007), *available at* http://www.stb.dot.gov/filings/all.nsf/457f7ba95a516a6285 2567d900574766/476d4f2 .6705be58852572b400013ac4/$FILE/218992. pdf.

AAR and its members have a vital interest in preserving the effectiveness of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), now codified at 49 U.S.C. § 11501 (2000), and the federal remedies it provides.[3] Congress enacted Section 11501 to prohibit discriminatory state taxation of interstate railroads, a widespread and long-standing practice that it found to "unreasonably burden and discriminate against interstate commerce. . . ." 49 U.S.C. § 11501(b). On behalf of the railroad industry, AAR participated in the legislative process that led to passage of Section 11501 and has an important stake in ensuring that the reforms enacted by Congress are not lost or attenuated by permitting states to evade the protections Section 11501 provides.

The burden of discriminatory taxation would be harmful to interstate rail carriers, their shippers and consumers at any time. But it would be particularly harmful now, when railroads face the need to invest in major infrastructure upgrades to handle growing demand for service. Earlier this year, the Surface Transportation Board conducted hearings on capacity and infrastructure issues facing the industry. *See* Notice of Public Hearing, STB Ex Parte No. 671, Rail Capacity and Infrastructure Requirements, 72 Fed. Reg. 11,085 (Mar. 12, 2007). The Board described the market forces driving the need for increased rail infrastructure investment:

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[3] There are some differences in language between Section 11501 as originally enacted in Section 306 of Pub. L. No. 94-210, 90 Stat. 31, 54-55 (1976), and as subsequently recodified at 49 U.S.C. § 11503, which was later redesignated as 49 U.S.C. § 11501. The recodification was not intended to effect any substantive change. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).

> In recent years, there has been growing recognition that rail capacity in the United States has become constrained. Those capacity constraints come at the same time as many forecasts predict that rail freight demands will continue to grow over the next twenty years. Railroads experienced a more than 50% increase in traffic from 1990 to 2003, and traffic is projected to continue to increase as the economy grows. Some forecasters predict that multimodal freight tonnage in the United States will rise by nearly 70% between 1998 and 2020.

Id. at 11,085 (footnotes omitted). As the Board went on to explain, "[t]he convergence of increased demand with constrained capacity has highlighted the need to address what further infrastructure investment will be required to meet these demands. *Id.*

AAR and a number of its members participated in those hearings, detailing the enormous capital investments that are required to meet the demand for additional rail service using new or upgraded infrastructure. AAR described the rapid rise of capital spending by the Class I railroads from $5.9 billion in 2003 to a projected $9.4 billion in 2007, as well as a wide range of major investments that those interstate carriers have recently made or will soon make.[4] The Department of Transportation also underscored the fact that

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[4] STB Ex Parte No. 671, Comments of the Association of American Railroads at 10-12 (Apr. 4, 2007), *available at* http://www.stb.dot.gov/filings/all.nsf/457f7ba95a516a62852567d900574766/f30e9ecaf18ade04852572b30064c1fd/$FILE/218972.pdf. Comments also were submitted by Burlington Northern Santa Fe Corporation, Canadian National Railway Company and its U.S. subsidiaries, CSX Corporation, Kansas City Southern Railway and affiliates, Norfolk Southern Railway Company, Union Pacific Corporation and Union Pacific Railroad Company.

"[f]reight railroading is among the most capital-intensive of industries," with continuing needs for major capital projects.[5]

The Eleventh Circuit's decision requiring courts to accept without question whatever methods state tax appraisers use to value railroad property vastly increases the potential for future state tax discrimination, and thus threatens to deter, limit or skew new rail infrastructure investment at the very time it is widely acknowledged as critical to the Nation's economy. That is precisely the sort of state-imposed obstacle to the movement of interstate commerce that Congress had the foresight to prohibit by enacting a comprehensive and permanent ban on state tax discrimination in Section 11501.

The concerns that motivated Congress to pass the 4-R Act thus are just as present today as they were in 1976. AAR and its members remain vitally interested in ensuring that the antidiscrimination measures Congress enacted are preserved and that railroads are permitted to offer all relevant evidence of state tax discrimination, as intended by Congress in Section 11501.

SUMMARY OF ARGUMENT

Congress enacted Section 11501 to end discriminatory state taxation of interstate railroads. Section 11501(b)(1), which is at issue here, prohibits states from taxing railroad property "at a value that has a higher ratio to the true market value of [such] . . . property than the ratio that the assessed value of all other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." 49 U.S.C. § 11501(b)(1). In *Burlington Northern Railway v. Oklahoma*

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[5] Statement of Jeffrey N. Shane at 4-6, 8-10, *in* Ex Parte No. 671.

Tax Commission, 481 U.S. 454, 461 (1987) ("*Oklahoma Tax*"), this Court held that a railroad does not have to show discriminatory intent in order to challenge a state's valuation of its property. Rather, a railroad need only show that it was subjected to a higher assessment ratio than other commercial and industrial property. Moreover, the Court held that "in order to compare the actual assessment ratios," a district court must "determine what the 'true market values' are" on its own, and that "'true market value'" is *not* "whatever the State determines [it] to be. . . ." *Id.* at 461-62.

Oklahoma Tax left open the precise question presented in this case—whether Section 11501 bars courts from considering evidence of valuation methodologies different from the methodologies utilized by the state. But the plain language, structure and purpose of the statute, as well as the rationale of the Court's decision in *Oklahoma Tax*, all compel the conclusion that district courts are not precluded from considering, or determining true market value on the basis of, such evidence. The Eleventh Circuit's decision to the contrary imposes a judicially constructed exclusionary rule that prevents courts from considering all relevant evidence of true market value and undermines the statute's fundamental purpose. Such a holding would open a gaping loophole through which states would be able to engage in the very discriminatory practices Congress sought to prevent, permitting them to extract a disproportionate share of tax revenue from interstate railroads without fear of federal remedy.

ARGUMENT

I. Section 11501 Plainly Prohibits All Tax Discrimination by States, Including Discrimination Effected Through the Overvaluation of Railroad Property

A. Congress Sought to Prevent All State Tax Discrimination Against Interstate Rail Carriers

More than forty years ago, Congress recognized discriminatory state taxation as one of the key factors that had led to the drastic decline of the railroad industry. Special Study Group on Transportation Policies in the United States, Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 87-445 (1961). The problem became increasingly acute over the next decade, until Congress enacted the 4-R Act to address a host of problems that had left the railroad industry in a precarious financial condition and resulted in eight major railroad bankruptcies. S. Rep. No. 94-499, at 2-3 (1975), *reprinted in* 1976 U.S.C.C.A.N. 14, 15-16; H.R. Rep. No. 94-725, at 53 (1975). After 15 years of study, Congress enacted Section 11501 as a critical part of that reform. Its express intent was to end discriminatory state taxation of railroads.

Congress recognized that interstate railroads "are easy prey for State and local tax assessors." Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630, at 3 (1969). Interstate rail operations depend on enormous capital investments, which are essentially immovable; once constructed, those assets become captive to the taxing state. *See id.* Moreover, the normal political constraints that deter state officials from engaging in discriminatory or excessive taxation are absent when out-of-state railroads are forced to

bear that cost. *See id.* ("Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals.").

The nature of interstate railroad operations exacerbates the problem. Many operate across numerous states. Among the largest, the BNSF Railway system owns or operates rail lines in 28 states, the Canadian Pacific/Soo Line system 10 states, the Canadian National/Grand Trunk system 13 states, the CSX system 23 states and the District of Columbia, the Kansas City Southern Railway system 10 states, the Norfolk Southern system 23 states and the District of Columbia, and the Union Pacific system 25 states.[6]

The freight these systems and other interstate rail carriers move is often owned by, shipped from or shipped to customers outside states traversed in the rail movement. Intermodal traffic (the fastest growing segment) often begins or ends on motor carriers in states that are not included in the rail portion of the movement. And a substantial volume of interstate rail freight involves foreign commerce, carrying exports and imports to and from U.S. seaports as well as border crossings with Canada and Mexico. In many cases, rail freight may have no relation to a state other than passing through it while moving from its origin to its destination.[7]

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[6] *See* Schedule 702 of the Class I Railroad Annual Reports on Form R-1 for the year ending December 31, 2006, *available at* http://www.stb.dot.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9?OpenView&Start=1&Count=300&Expand=1#1.

[7] This is true not only for railroads that have lines in more than one state, since railroads operating in a single state may nonetheless carry freight moving in interstate or foreign commerce.

The burden of a state's discriminatory taxation of interstate rail carriers thus does not necessarily—and indeed may never—fall on businesses or individuals in that state. When a state imposes discriminatory taxes on a railroad, the cost will be passed along to shippers to the extent competition and other forces permit, and from shippers to consumers. As Congress recognized, this shifts the cost of one state's discriminatory taxation to citizens of states that do not engage in tax discrimination: "Ultimately, the shipper and consumer pay the bill for discriminatory taxation. Not only are such taxes reflected in the transportation costs of goods purchased by the consumer, but also the consumers of States which do not discriminate are forced to share the cost of these burdensome tolls." S. Rep. No. 91-630, at 3.

The 4-R Act mandated an end to the historical burden of state tax discrimination and, with later legislation and regulatory reforms, paved the way for the railroad industry to recover, although that process took many years. But Congress was not merely focused on the past. The same structural incentives that had led states to impose discriminatory taxes on railroads historically—multistate movements by out-of-state railroads carrying freight that often merely transits the taxing state—remained in place. Congress therefore banned discrimination comprehensively, not only eliminating the specific modes of discrimination that burdened interstate rail traffic at that time, but also prohibiting all forms of tax discrimination that states might resort to in the future.

The necessity of doing so is evident. States appraise property with regular frequency. Opportunities for unlawful tax discrimination against railroads consequently may arise as often as each year. Ever-present budgetary concerns impel states to seek tax revenues wherever they appear to be available. Political constraints may contain that impulse as to

local taxpayers, but as Congress recognized, those constraints often do not apply when interstate railroads are the taxpayers. States thus face incentives on a regular basis to test the limits of Section 11501—and will surely pursue those incentives to the maximum extent possible if the Eleventh Circuit's rule permitting discrimination through the guise of valuation or accounting methodologies is allowed to stand.

Section 11501 was intended "'to put an end to the widespread practice of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district.'" S. Rep. No. 91-630, at 2 (reference omitted). As originally enacted, it declares that it is an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce for a state or political subdivision to engage in any of the following prohibited acts:

> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of property tax levied by any taxing district, of transportation property at a value that bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> (b) The levy or collection of any tax based on an assessment which is unlawful under subdivision (a).
>
> (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to other commercial and industrial property in the same assessment jurisdiction.

> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

Pub. L. No. 94-210, § 306, 90 Stat. 31, 54.

By barring state taxation of railroad property based on an assessed value that has a ratio to "true market value" higher than that for "other commercial and industrial property" and forbidding imposition of a higher tax rate than "generally applicable" to such other property, Section 11501 ensures that interstate railroads are treated no worse than the much larger population of business property owners—who have much greater influence on state tax policy decisions. With the last prohibition (subsection (d)), Congress imposed a catch-all ban on "any other tax" that yields discriminatory treatment of railroads. *See, e.g., Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 209 (8th Cir. 1981); *Union Carbide Corp. v. Indiana Bd. of Tax Comm'rs*, 161 F.R.D. 359, 364-65 (S.D. Ind. 1993) ("The 4-R Act was intended to combat all forms of discriminatory taxation of railroads.").

The very presence of subsection (d) (now Section 11501(b)(4)) emphatically confirms that Congress never intended to leave the enormous loophole in Section 11501(b)(1) the Eleventh Circuit has created. It would have been bizarre to allow discrimination effected through a state's choice of valuation methods but then broadly forbid "any other tax" (or as recodified, "another tax") that results in discrimination. The breadth of the catch-all makes clear both the comprehensive nature of the ban on discrimination Congress enacted and the repugnancy of the Eleventh Circuit's decision to that statutory scheme.

B. This Court in Oklahoma Tax Recognized that Section 11501 Requires Federal Courts to Determine for Themselves the "True Market Value" of Railroad Property

One method by which states have sought to discriminate against interstate railroads is by overvaluing their property. When a state overvalues a railroad's property, it nominally can apply the same tax rate as it does to other commercial and industrial property, and yet still exact more than the railroad's fair share of taxes. It is for this reason that Congress, in Section 11501, expressly prohibited states from assessing railroad property "at a value that bears a higher ratio to the true market value of such . . . property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property."

This Court in *Oklahoma Tax* held that Section 11501 means what it says: the statute forbids a valuation of railroad property that is disproportionately high in relation to the property's true market value as compared with the valuation of other commercial and industrial property. 481 U.S. at 461. *Oklahoma Tax* explicitly confirmed that, in the event of a dispute, federal courts are responsible for determining a railroad's true market value. In order to perform the comparison of assessment ratios required under Section 11501, this Court decided, "it is necessary to determine what the 'true market values' are," *id.*, and therefore "assessed value and true market value are subjects for judicial inquiry," *id.* at 462. The Court squarely rejected the contention "that whatever the State determines the value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny . . . ." *Id.* at 461-62.

The Court did not then need to resolve whether a railroad may utilize a valuation methodology different from the state's appraiser when bringing a challenge under Section 11501, since the railroad used the same methodology as the state appraiser in that case and simply challenged the state's application of that methodology. 481 U.S. at 463 n.5. But the logic of the Court's decision compels the conclusion that railroads must be able to prove the true market value of their property using any methods that the district court finds more accurate than the state's approach. True market value is arrived at by applying several appraisal methods to various factual inputs. Thus, if, as this Court held, the true market value is subject to judicial scrutiny, courts must be allowed to consider whatever valuation methodologies are relevant to determining true market value.

Moreover, having courts consider all relevant evidence of valuation in Section 11501 cases—including different appraisal methods used in the valuation process—would not be unduly burdensome or complicated. District courts routinely weigh this sort of evidence in deciding the value of property in analogous cases.[8] Even under the Eleventh

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[8] *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 742 (1997) ("determinations of market value are routinely made in judicial proceedings without the benefit of a market transaction in the subject property"); *United States v. Miller*, 317 U.S. 369, 374 (1943) (in condemnation proceedings, court's assessment of property's fair market value is the measure of just compensation); *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F. 3d 1371, 1378 (9th Cir. 1995) ("[W]e are not swayed by the argument that the 'fair value' determination is non-justiciable because it calls for a 'policy determination of a kind clearly for non-judicial discretion.' Congress already made the policy decision that the Navajo should compensate the Hopi. . . . What Congress left for the courts, calculating 'fair value,' is within the expertise of the judiciary."); *United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598 (5th Cir. 1961) (detailing district court's consideration of valuation methods used by eminent-domain commission); *Horn v. McQueen*, 353 F. Supp. 2d 785 (W.D. Ky. 2004) (court carefully evaluated competing valuation

Circuit's constricted interpretation of the statute, courts would be obliged to review the application of the several valuation methods typically used by states' appraisers—just as the district court did here. Petition Appendix ("Pet. App.") at 34a-71a. Permitting courts to consider evidence based upon other methods thus would not result in an appreciably heavier burden on them.

Finally, there is little risk that permitting consideration of other methods would open the floodgates to valuation challenges. The very presence of Section 11501(b)(1), properly construed, deters discriminatory valuations of railroad property in the first place. In addition, many actions brought under Section 11501(b)(1) are settled before a district court is required to address valuation issues. Indeed, in the twenty years since this Court's decision in *Oklahoma Tax*, we are aware of fewer than a dozen reported decisions in which a district court undertook, acknowledged it would undertake or would have been required as a result of a remand to undertake an analysis of a railroad's true market value under subsection (b)(1).[9] Permitting courts to consider

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approaches of experts in ERISA case); *McKesson Corp. v. Iran*, 116 F. Supp. 2d 13 (D.D.C. 2000) (in determining damages, court carefully evaluated parties' direct-capitalization and discounted cash flow valuations of the affected business), *aff'd in part*, 271 F.3d 1101 (2001), *vacated in part*, 320 F.3d 280 (D.C. Cir. 2003); *Swope v. Siegel-Robert, Inc.*, 74 F. Supp. 2d 876 (E.D. Mo. 1999) (considering several stock valuation methods in case involving "squeeze-out" merger), *modified*, 243 F.3d 486 (8th Cir. 2001); *OMP v. Sec. Pac. Bus. Fin., Inc.*, 716 F. Supp. 251 (N.D. Miss. 1989) (in deficiency action, court considered five appraisal reports including three different valuation methods, and eventually adopted its own valuation approach); *United States v. 121.20 Acres of Land*, 333 F. Supp. 21 (D.N.C. 1971) (court considered four valuation methods for agricultural land).

[9] *See Union Pac. R.R. v. Utah*, 198 F.3d 1201 (10th Cir. 1999); *Burlington Northern R.R. v. Bair*, 60 F.3d 410 (8th Cir. 1995); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473 (2d Cir. 1995); *Burlington*

any valuation methods they deem relevant thus would preserve the salutary effects of the statute in preventing discrimination without overburdening the federal judiciary.

II. Requiring Courts to Value Property Using Only the Valuation Methods Used by the State's Appraiser Would Eviscerate This Court's Holding in *Oklahoma Tax*, Undermine the Statute's Purpose, and Create More—Not Less—Work for District Courts

If, in determining railroad property's true market value, district courts were limited to considering only the valuation methods used by the state's tax appraiser, this Court's holding in *Oklahoma Tax* would be rendered almost meaningless. Property appraisers can use a range of valuation methods and techniques to estimate market value, and typically use more than one in valuing a particular piece of property. Different methods may yield significantly different valuations, even when the underlying data is kept constant. The choice of methodology thus may have at least as great an impact on a valuation as the hard data. Yet, if courts were barred from considering any valuation methodology that was not used by the state's appraiser, states would be free to choose whatever methodology resulted in the highest valuation of a railroad's property, and district courts would be hamstrung in determining whether that valuation constituted the *true* market value of the property.

Northern R.R. v. Dep't of Revenue, 23 F.3d 239 (9th Cir. 1994); *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244 (4th Cir. 1993); *Union Pac. R.R. v. Dep't of Revenue*, 920 F.2d 581 (9th Cir. 1990); *Burlington Northern R.R. v. James*, 911 F.2d 1297 (8th Cir. 1990); *Atchison, Topeka & Santa Fe Ry. v. Bd. of Equalization*, 795 F.2d 1442 (1986), *vacated and remanded*, 828 F.2d 9 (9th Cir. 1987) (*per curiam*); *Fox River Valley R.R. v. Dep't of Revenue of Wisconsin*, 863 F. Supp. 893 (E.D. Wis. 1994); *Union Pac. R.R. v. State Tax Comm'n of Utah*, 716 F. Supp. 543 (D. Utah 1988).

A court could certainly decide, in a particular case, that the state appraiser's methodology was the most likely to produce the best approximation of true market value. But this is by no means a given. A court can meaningfully make such a determination only after considering all relevant evidence and evaluating witnesses' credibility. Requiring a court to accept, without question, a state appraiser's methodology would turn the adversarial process into a one-sided show trial heavily slanted toward the state, and render the court a mere spectator or fact-checker. It would thus eviscerate this Court's unanimous and emphatic holding in *Oklahoma Tax* that true market value is a "subject[] for judicial inquiry," 481 U.S. at 462, and that true market value is not whatever the state says it is, *id.* at 461-62. *See also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) (in condemnation proceedings, "determin[ing] what shall be the measure of compensation . . . is a judicial and not a legislative question," and it is not up to the legislature "to say what compensation shall be paid, or even what shall be the rule of compensation").

Such a result would also undermine the entire purpose of Section 11501. If a state appraiser's methodology had to be accepted by district courts without question, appraisers would be free to *purposely* employ methodologies that overvalued railroad property. It would be a bitter irony if, after this Court decided in *Oklahoma Tax* that a railroad need not prove that a state intended to discriminate in order to prevail under Section 11501, that statute were now interpreted in a way that *permits* intentional discrimination through a state's choice of methodology. Congress did not require proof of intent. But it also certainly did not mean to create a loophole that *immunized* intentional discrimination from judicial review.

The Eleventh Circuit's interpretation of Section 11501(b)(1) may, without cliché, be termed Kafkaesque. It amounts to holding that a district court must accept the state appraiser's valuation method in determining a railroad's true market value, even if that method in fact results in a demonstrably incorrect value. Unlike characters in Kafka novels, though, Congress—and this Court in *Oklahoma Tax*—meant what they said: "true" means true, not just what a state official deems necessary.[10]

The Eleventh Circuit's purported distinction (Pet. App. 16a) between "accounting methods" and "factual determinations" is also a false one—or at best a distinction that is exceedingly difficult to draw when it comes to property appraisals. For example, the cost methodology requires a determination of the amount by which assets have depreciated. But it is not clear whether, under the Eleventh Circuit's rule, resolution of this issue would be considered a factual determination, a methodological decision, neither, or some combination of the two. The reality is that valuations depend on a varying mix of methods, techniques, facts, and assumptions, with no easy distinction among the inputs to the process. *See, e.g.*, *United States v. Miller*, 317 U.S. 369, 374-75 (1943) ("[E]ven in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. . . . [T]he application of this concept involves, at best, a guess by informed persons."); S. Rep. No. 91-630, at 15

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[10] *See* F. Kafka, *The Trial* (1925) ("it is not necessary to accept everything as true, one must only accept it as necessary"). The Eleventh Circuit's decision resembles that parable in *The Trial* in one other respect: just as the door-keeper to "the Law" tells a man waiting for admission that "this door was intended only for you" but refuses ever to admit him, the Eleventh Circuit tells railroads that Section 11501 created legal relief just for them, but then denies them meaningful access to that relief.

(Congress provided 5% "tolerance factor" to take into account the "uncertainties inherent in the assessment process"). To insist, as the Eleventh Circuit did, that "accounting methods" are off-limits to judicial inquiry but "factual determinations" are not is thus wholly at odds with the realities of property appraisals. *See, e.g., Burlington Northern R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990) ("in cases like this the line between 'methodology' and 'application' is so thin as to be almost ephemeral."); *CSX Transp., Inc. v. Forst*, 777 F. Supp. 435, 443 (E.D. Va. 1991) (noting "[t]he real question presented, of course, is how one makes a distinction between 'method' and 'application.'").

Moreover, engrafting the Eleventh Circuit's distinction between valuation methods and factual determinations onto the statute would invite states to label anything they do in appraisals as being "methodology" and therefore immune from challenge—and the states can be expected to raise this issue in virtually every case. This would require district courts to expend judicial resources determining, as a preliminary matter, whether a railroad was using an accounting method different from the state's or whether it was only challenging the accuracy of the state's "factual determinations."[11] Yet that expenditure would not even be directed at the dispositive issue of true market value, thus wasting judicial resources without performing the role assigned to the courts by Congress.

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[11] This presumably would require the parties to present expert testimony (possibly by "experts" wholly independent of their appraisers) on the issue of what constitutes a part of the methodology and what constitutes a mere factual determination pursuant to the methodology.

III. Federalism Considerations Do Not Justify a Rule that Excludes Relevant Evidence of True Market Value and Effectively Immunizes Discrimination

The Eleventh Circuit concluded that a district court may not consider evidence of valuation that relies on an accounting method different from the state appraiser's because "[t]he text of the Act does not clearly state that railroads may challenge valuation methodologies." Pet. App. 14a. That conclusion was based on the Eleventh Circuit's mistaken view that a contrary result would impinge on state sovereignty. But allowing courts to consider different accounting methods does not intrude on state sovereignty. Even if it did, Section 11501 more than satisfies any "clear statement" rule.

A. District Court Consideration of Alternative Appraisal Methods in Determining True Market Value Would Not Intrude on State Sovereignty

The Eleventh Circuit's decision to apply the clear statement rule was predicated on the view that "[t]he selection of a valuation methodology is part of the fundamental power of a state" and involves "[i]mportant questions of state policy." Pet. App. 12a. But this premise misapprehends the nature of valuation decisions generally and is inconsistent with the facts of this case. As a rule, appraisers do not rely on one prescribed methodology when valuing property. Rather, depending on the characteristics of the specific property, the appraiser's experience, and the available data at hand, an appraiser normally utilizes several different methodologies. Each valuation method produces "evidence of value" which the appraiser then considers in his or her professional judgment. *See, e.g.*, National Ass'n of Tax Administrators, *Appraisal of Railroad and Other Public Utility Property for Ad Valorem Tax Purposes* 8 (1954). The

appraiser's choice of methodologies is an exercise of professional judgment about what price a property would bring if sold on the market—not the expression of legislative or executive policymaking.[12]

The facts of this case are consistent with this general approach. Georgia does not mandate any particular valuation methodology by state constitution or statute. Rather, the decisions on how to conduct the appraisal and select a final valuation of the railroad's property are largely left to appraiser discretion. *See* Pet. App. 3a-5a. Indeed, Georgia appraisers made significant changes in their methodological approach from year to year, and even in the course of developing and defending the valuation at issue in this case. *Id.*[13] These repeated and *ad hoc* changes by individual appraisers belie the notion that the choice of valuation methods is such a fundamental expression of state policy that it should be immune from judicial inquiry. Moreover, Georgia counties are not even required to use the State

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[12] This case thus differs markedly from *Department of Revenue v. ACF Industries*, 510 U.S. 332 (1994). There, this Court, interpreting subsection 11501(b)(4) (the statute's "catch-all" provision), noted that principles of federalism supported its interpretation of the provision as not prohibiting states from granting tax exemptions for non-railroad properties. In that case, however, the state exempted by statute various classes of business property as a matter of legislative policy.

[13] Georgia had used the yield capitalization approach—the same approach on which CSX's expert primarily relied in this case—in prior years, but in 2002 a new appraiser switched methodologies. That switch was not the result of any state policy pronouncement. Rather, appointment of a new appraiser led to a change in methodology, and that new appraiser himself made further changes during the course of this litigation. *See* Pet. App. 3a-5a. In addition, the state's appraiser ultimately settled on a valuation "at the lower end of the range" produced by his different methods in order "to avoid litigation," not because of any state "policy" favoring one method over another. Pet. App. 5a.

appraiser's proposed assessment for public utilities. Pet. App. 2a-3a. Thus, different appraisers in each relevant Georgia county could have used their own methodologies to assess the value of CSX property in each county, and the counties could have used those valuations rather than the state appraiser's in levying taxes.[14]

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[14] This consequently is not a case in which a particular methodology was mandated or precluded by a state's constitution or statutes. *Compare Chesapeake W. Ry. v. Forst*, 938 F.2d 528, 529-30 (4th Cir. 1991) (Virginia constitution precluded use of unit valuation); *Arizona v. Atchison, Topeka & Santa Fe R.R.*, 656 F.2d 398, 400 (9th Cir. 1981) (state statute requiring railroads to be assessed at 60% of full cash value and most other commercial and industrial property at 50%). But whether or not a methodology is embodied in constitutional or statutory provisions is beside the point. If such provisions require discrimination against railroads, they violate Section 11501. *See, e.g.*, S. Rep. No. 91-630, at 9 (discriminatory "actions are forbidden under the language of [the bill] whether they are taken pursuant to or in accordance with a State constitutional provision or State or local statute, or administrative order or practice, or otherwise"). Insulating constitutional or statutory valuation rules from challenge thus would be directly contrary to Section 11501. It also would invite states to enshrine discrimination in those forms. *Cf Louisville & N. R.R. v. Pub. Serv. Comm'n*, 493 F. Supp. 162, 166 (M.D. Tenn. 1978) (amendment to Tennessee Constitution requiring railroads to be assessed at 55% of value, but industrial and commercial property at 40%, adopted after discriminatory appraisals were held to violate Equal Protection Clause) (prior to effective date of Section 306), *aff'd*, 631 F.2d 426 (6th Cir. 1980). Although a state constitution or statute may bind state appraisers, it does not bind a federal court applying a federal statute. *Cf. Miller*, 317 U.S. at 379-80 ("We need not determine what is the local law [for determining fair market value], for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution of the United States." (footnotes omitted)).

Even if a state appraiser's choice of valuation methods could be characterized as an expression of policy or an exercise of fundamental state sovereignty, allowing courts to consider other methods in determining true market value does not infringe on that sovereignty. Nothing in Section 11501 requires that a state's appraiser forsake his or her preferred valuation methods and adopt one chosen by a federal court. Rather, the statute simply prevents a discriminatory *outcome*, regardless of the methodology the state's appraiser employs, and provides a remedy where a court finds discrimination that exceeds a certain threshold.[15] Moreover, the remedy provided by Section 11501 is not to impose some uniform federal valuation method, but merely to enjoin the amount of taxation that resulted from discrimination—*i.e.*, the amount above what would have been required if the railroad's property had been assessed fairly, and consistently with other commercial and industrial properties. The original text of Section 11501(b)(1) as enacted prohibited assessment discrimination "only to the extent of any portion based on excessive values as hereinafter described." *See* Pub. L. No. 94-210, § 306(1)(a), 90 Stat. 31, 54 (1976); *see also* S. Rep. No. 91-630, at 13.[16] The state appraiser can continue to use whatever valuation method he or she chooses, subject only to the requirement that it not result in unlawful discrimination against the railroad. (And those methods might produce nondiscriminatory results for other taxpayers or in other years.) The statute thus in no way proscribes or prescribes any particular methodology.

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[15] *See, e.g.*, S. Rep. No. 91-630, at 25-26 ("[The bill] does not suggest or require a State to change its assessment standards, assessment practice, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other.").

[16] The deletion of that phrase occurred in recodification, which was not intended to make any substantive change in the law.

To the extent Section 11501 might impinge on state sovereignty interests, such impingement arises from the fact that the statute allows a railroad to contest, and courts to review, a state's valuation of property in the first place. But as this Court concluded in *Oklahoma Tax*, while "[t]hese are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors," they are not reason for a court to refuse to enforce the statute's plain meaning. 481 U.S. at 464. Thus, this Court unanimously affirmed a court's ability, and responsibility, to determine true market value. Allowing courts to consider different appraisal methods in making that determination of true market value in no way constitutes an additional impingement on state sovereignty. It simply permits courts to consider, in the normal and regular course of conducting the judicial inquiry upheld in *Oklahoma Tax*, all relevant evidence. Nothing in the statute suggests that a state appraiser's choice of methodology is immune from review, or that courts must exclude certain evidence that contradicts a state appraiser's valuation. The Eleventh Circuit's decision to the contrary creates a judicially engrafted exclusionary rule that undermines congressional intent and impedes district courts from performing their traditional role of considering all relevant evidence.

B. Even if a Clear Statement of Congressional Intent to Allow Consideration of Alternative Valuation Methods Were Required, Section 11501 Is Amply Clear

Even if a "clear statement" of congressional intent were required, Section 11501 is more than clear. In *Oklahoma Tax*, this Court held that Section 11501's plain language clearly "permits review by federal courts of alleged overvaluation of railroad property by state taxation

authorities." 481 U.S. at 456. Seven years later, in *ACF Industries*, this Court noted that the "reach of subsections (b)(1)-(3) is straightforward," 510 U.S. at 337, and that "Congress prohibited discriminatory tax rates and assessment ratios in no uncertain terms and set forth precise standards for judicial scrutiny of challenged rate and assessment practices," *id.* at 343 (citations omitted). Nothing in those decisions suggested that Congress's certain and precise language in fact contained some hidden ambiguity that would gut the entire purpose of the statute.

Congress was well aware when it enacted Section 11501 that appraisers use different methodologies to estimate the market value of property. *See, e.g.*, S. Rep. No. 91-630, at 4, 25 (noting varying assessment practices of states and localities, and the resulting variation in valuations). Congress was also well aware that courts routinely make independent determinations of market value, in tax assessment as well as condemnation and other cases.[17] Such determinations necessarily require a decision as to what valuation methods to employ.[18] Congress therefore knew

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[17] The legislative history of Section 11501 includes citations of cases in which courts evaluated the different methodologies employed by the parties in order to determine the market value of the property in question. *See* S. Rep. No. 91-630, at 25 (*citing New York Bay R.R. v. Kelly*, 22 N.J. Misc. 204, 37 A.2d 624 (N.J. B.T.A. 1944); *Fort Worth & D.N. Ry. v. Sugg*, 68 S.W.2d 570 (Tex. Civ. App. 1934); and *Guyandotte Valley Ry v. Buskirk*, 57 W. Va. 417, 50 S.E. 521 (1905)). Congress must also be presumed to be aware of this Court's numerous decisions holding that courts must assess all relevant evidence in determining a property's market value. *See, e.g., Miller*, 317 U.S. at 374; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

[18] *See, e.g., Guyandotte Valley Ry.*, 50 S.E. 521 ("numerous witnesses were introduced and examined in support of the contentions [of the parties]" and "[t]wo inconsistent theories, respecting the measure of compensation . . . were presented" to the court), *cited in* S. Rep. No. 91-630, at 25). Even the district court below acknowledged that "[i]n a more

that courts, in determining true market value under the "precise standards" of Section 11501, would need to decide which methodologies would produce the best estimate of true market value in a particular case. Indeed, it would have been superfluous for Congress to have explicitly instructed courts to consider all relevant evidence in determining true market value, including evidence concerning different valuation methods. Such a direction goes without saying. To paraphrase *ACF Industries*, 510 U.S. at 344, given the prevalence of judicial assessment of valuation methodologies when Congress enacted the 4-R Act, Section 11501's silence on the subject of methodologies simply reflects a determination to let courts use the normal methods of determining value.

Moreover, Congress specifically provided that the burden of proof in determining true market value is governed by state law. 49 U.S.C. § 11501(c). This shows that Congress knew how to put limits on how true market value could be proven when it wanted to. Yet, notably, it did not choose to put any such limit on what valuation methodologies railroads could use or courts consider. *See id.*

Finally, interpreting the statute as *not* permitting courts to consider alternative valuation methodologies would result in a situation "so bizarre that Congress could not have intended it." *ACF Industries*, 510 U.S. at 347 (internal quotation marks omitted) (*quoting Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991)). It would mean that Congress established a broad and comprehensive prohibition against discriminatory taxation of railroads and a remedial scheme that permits courts to determine the true market value of railroads, but

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typical case, the court would look to both [the railroad's] appraisal and the Department's appraisal to determine the true market value of CSXT." Pet App. 37a n.8.

that Congress then "turn[ed] around and nullif[ied] its own choice" by precluding courts from considering evidence regarding one of the most critical elements used to determine value—the valuation method. *Id.* at 343. Such a result would simply be "untenable in light of §[11501] as a whole." *Id.*

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded for a new trial.

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